No. 18A629

IN THE SUPREME COURT OF THE UNITED STATES

VIRGINIA HOUSE OF DELEGATES & M. KIRKLAND COX, SPEAKER OF THE VIRGINIA HOUSE OF DELEGATES, APPELLANTS,

v.

GOLDEN BETHUNE-HILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

STATE APPELLEES' RESPONSE IN OPPOSITION TO APPELLANTS' EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

MARK R. HERRING
Attorney General

STEPHEN A. COBB
Deputy Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MATTHEW R. MCGUIRE
Principal Deputy Solicitor General

MICHELLE S. KALLEN
Deputy Solicitor General

BRITTANY M. JONES
Attorney

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile
SolicitorGeneral@oag.state.va.us

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INTRODUCTION

This stay litigation underscores the problems with the notion that a single chamber of a bicameral state legislature may initiate an appeal—and thus prolong litigation—on behalf of an entire State.

Almost six months ago, a three-judge district court found "[o]verwhelming evidence" that 11 of Virginia's state legislative districts "sorted voters into districts based on the color of their skin," J.S. App. 97a, and enjoined use of those districts going forward. Less than a month later, the elected official who state law provides "shall . . . render[] and perform[]" "[a]ll legal service in civil matters for the Commonwealth," Va. Code Ann. § 2.2–507(A), announced that Virginia would not appeal the district court's liability ruling to this Court. A week later, the time for appealing that order expired. At that point, the liability phase was over, and the remedial phase had begun.

A single house of the Virginia legislature has attempted to countermand the Attorney General's decision and now asks this Court to halt the remedial process after the district court has twice—and unanimously—declined to do so. But nothing in Virginia law authorizes the House "to represent the State's interests," *Karcher* v. *May*, 484 U.S. 72, 82 (1987), and any claimed injury to the House itself cannot confer standing to appeal. That should be the end of the matter.

The House likewise cannot demonstrate that it will suffer any irreparable harm absent a stay. The application does not purport to speak for Virginia itself, so the House may not rely on the Commonwealth's sovereign interest in seeing its laws enforced. Nor does the House represent the "candidates and voters" to whom it

repeatedly alludes. Application 20. To the contrary: The House has no role in administering Virginia elections, and the state election officials who *are* responsible for ensuring "an orderly elections process," Application 21, agree with the district court that a stay is neither necessary nor in the public interest at this point.

The balance of equities also tips sharply against a stay. As the district court explained in unanimously denying the House's first stay application almost four months ago, deferring the remedial phase would create an unacceptable risk of "depriv[ing] the plaintiffs of a remedy" by having "the last election cycle before the 2020 census" held "under the unconstitutional districts." Application App. 3; accord *id.* at 4 (Payne, J., concurring). What is more, the House's repeated and lengthy delays in seeking a stay from this Court betray its current claim of "emergency."

The application for a stay should be denied.

STATEMENT

This litigation has already lasted more than four years, including two trials and one full previous trip to this Court.

1. The case began when 12 Virginia voters filed suit in December 2014, alleging that the state legislative districts in which they live were unconstitutional racial gerrymanders under this Court's decision in *Shaw* v. *Reno*, 509 U.S. 630 (1993). J.S. App. 6a. Because the action was one "challenging the constitutionality of the apportionment of . . . any statewide legislative body," a three-judge district court was convened pursuant to 28 U.S.C. § 2284(a). See J.S. App. 7a.

The named defendants are two Virginia state agencies (the State Board of

Elections and the Department of Elections) and four state election officials sued in their official capacities. See J.S. iii (listing parties). Under state law, Virginia's elected Attorney General has the exclusive responsibility for providing "[a]ll legal service in civil matters" for each of the named defendants, as well as for "the Commonwealth" itself. Va. Code Ann. § 2.2–507(A) (specifically referencing "every state department , . . board, [and] official").

In January 2015, the Virginia House of Delegates (the lower chamber of Virginia's state legislature) and its then-Speaker William J. Howell (collectively, the House) moved to intervene. The motion cited the House's status as "the legislative body that actually drew the redistricting plan at issue" and asserted that the movants were seeking intervention "to protect their interest in the subject matter of this litigation." Mem. of P&A in Supp. of Mot. of the Va. House of Delegates & Va. House of Delegates Speaker William J. Howell to Intervene (Intervention Motion) at 2–3. At no point did the House seek to represent the Commonwealth itself or assert that state law gave it any right to do so. See *id.* at 2, 6 (asking that "this honorable Court allow Applicants to intervene as defendants in order to protect *their* interest in the subject matter of this litigation") (emphasis added). None of the existing parties opposed the House's motion, and the district court granted it in February 2015.

2. After five months of discovery, the three-judge district court held a four-day bench trial in July 2015. Three months later, the district court upheld all of the challenged districts by a 2-1 vote. The plaintiff voters appealed to this Court,

which noted probable jurisdiction, received full briefing and argument, and ultimately reversed the district court's decision with respect to 11 of the 12 challenged districts. See *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017). At that point, the case had been pending for more than two years, and only two elections remained before the next constitutionally mandated round of redistricting.

The case returned to the district court. Following extensive briefing about the impact of this Court's decision and additional discovery, the district court held a second four-day bench trial in October 2017. By the time post-trial briefing was concluded on November 22, 2017, another election had come and gone under the challenged map, meaning that only one election remained before the 2020 census. See Va. Code Ann. § 24.2–215 ("The members of the House of Delegates shall be elected at the general election in November 1995, and every two years thereafter for terms of two years . . . .").

3. On June 26, 2018, the district court issued its second liability opinion. By a 2-1 vote, the court found "[o]verwhelming evidence . . . that the state has sorted voters into districts based on the color of their skin," J.S. App. 97a, and enjoined "[t]he Commonwealth of Virginia . . . from conducting any elections . . . for the office of Delegate . . . in the Challenged Districts until a new redistricting plan is adopted." *Id.* at 203a.

The district court's ultimate liability determination was supported by extensive, case-specific factual findings. The court found "as a matter of fact that

the legislature employed a mandatory 55% BVAP [Black Voting Age Population] floor in constructing all 12 challenged districts," J.S. App. 18a–19a, and that it "arbitrarily applied the same racial mandate to 12 vastly dissimilar districts." *Id.* at 97a. While emphasizing that the "interconnectedness between districts" meant "that the fates of the 11 remaining challenged districts were inextricably intertwined," *id.* at 83a, the court also made lengthy factual findings about each of the 11 challenged districts, *id.* at 38a–80a.

In addition, the district court resolved several critical credibility issues in favor of the plaintiff voters. The court specifically found that one of the House's witnesses "did not present credible testimony," J.S. App. 35a, and it "g[a]ve little weight" to the testimony of another House witness, citing the witness's "very poor memory at the second trial, as well as his inability to account for material inconsistencies in his testimony." *Id.* at 38a; see *id.* at 82a (describing one witness's testimony as "wholly lacking in credibility"). "These adverse credibility findings," the district court emphasized, were "not limited to particular assertions of these witnesses, but instead wholly undermine the content of [their] testimony." *Id.* at 82a. For that reason, the district court agreed with the dissenting judge's statement that its "credibility findings [were] 'outcome determinative' in this case." *Id.* (quoting dissenting opinion).

4. Federal law permits a direct appeal to this Court "from an order granting . . . an interlocutory or permanent injunction in any civil action . . . required by any Act of Congress to be heard and determined by a district court of

three judges." 28 U.S.C. § 1253. Because the district court had not yet imposed a remedy, its decision was interlocutory, and the deadline for filing an appeal was July 26, 2018—30 days after the district court's decision. See 28 U.S.C. § 2101(b).

On July 19, 2018, Virginia's elected Attorney General announced—both publicly and in a filing with the district court—that the Commonwealth would not be appealing the district court's liability ruling. In explaining that decision, the Attorney General cited "the high bar to overcoming the [district court's] extensive factual findings, the significant time and expense that have already gone into this case and that would only be further increased by an appeal, and the compelling interest in promptly remedying what [the court] has concluded is an unconstitutional racial gerrymander."[1] For those reasons, the Attorney General "determined that continued litigation would not be in the best interests of the Commonwealth or its citizens and that an appeal to the United States Supreme Court is thus unwarranted."[2] One week later, the time for appealing the district court's liability order expired.

5. The remedial phase in this case has been adversely impacted by the House's attempt to appeal the district court's liability ruling and its persistent efforts to delay the remedial phase pending that appeal.

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[1] Defs.' Opp'n to Intervenor-Defs.' Mot. to Stay Injunction Pending Appeal Under 28 U.S.C. § 1253 (First Stay Opposition) at 1–2; see Dave Ress, *Redistricting Legal Battle Cost to Taxpayers: $4 Million and Rising*, Daily Press, July 13, 2018, https://www.dailypress.com/news/politics/shad-plank-blog/dp-nws-redistricting-bill-20180713-story.html.

[2] First Stay Opposition at 1; accord Press Release, *Herring Urges General Assembly to Eliminate Racial Gerrymandering in House of Delegates Districts as Quickly as Possible*, July 19, 2018, https://www.oag.state.va.us/media-center/news-releases/1233-july-19-2018-herring-urges-general-assembly-to-eliminate-racial-gerrymandering-in-house-of-delegates-districts-as-quickly-as-possible (same).

In July, the House asked the district court to stay its liability order pending appeal. The district court denied that motion, Application App. 2–5, and the House did not seek a stay from this Court.

In November and December, the House first asked the District Court to delay the remedial phase and then filed a second motion formally asking the district court to do so because of this Court's decision to schedule full briefing and argument. The state appellees opposed the House's renewed stay motion, explaining that, "[a]s the entities and officials who administer Virginia elections," they "d[id] not believe that any . . . modification[s]" to Virginia's normal election calendar were "necessary or appropriate at this time." Defs.' Opp'n to Intervenor-Defs.' Renewed Mot. for Stay Pending Appeal and Mot. for Order Resetting Virginia House Election Date (Second Stay Opposition) at 5. The state election officials pledged that they would, "of course, continue to monitor the situation closely and . . . promptly advise this Court if they believe that modifications are necessary to permit Virginia to hold elections in an orderly and appropriate manner." *Id.*

ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers).[3] "The judgment of the court below is presumed to be valid, and absent unusual circumstances [this Court] defer[s] to the decision of that court not to stay

[3] The House errs in suggesting that the normal rules for granting a stay pending appeal are flipped "in redistricting cases." Application 11. To the contrary, this Court has regularly declined to grant stays in racial-gerrymandering cases, including ones from Virginia. See, *e.g.*, *McCrory* v. *Harris*, 136 S. Ct. 1001 (2016) (mem.); *Wittman* v. *Personhuballah*, 136 S. Ct. 998 (2016) (mem.); *Abrams* v. *Johnson*, 521 U.S. 74, 78 (1997).

its judgment." *Wise* v. *Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers); accord *Conforte* v. *Commissioner of Internal Revenue*, 459 U.S. 1309, 1311 n.1 (1983) (Rehnquist, J., in chambers) (referring to a stay applicant's "burden of overcoming the presumptive correctness" of the lower court's decision). A stay applicant's always "heavy burden," *Williams* v. *Zbaraz*, 442 U.S. 1309 (1979) (Stevens, J., in chambers), is even more "stringent" where—as here—"[a] District Court of three judges has considered [an] application for a stay pending appeal and concluded that the stay should be denied," *Aberdeen & Rockfish R.R. Co.* v. *Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207, 1218 (1972) (Burger, C.J., in chambers).

The fact that this case is "presented on direct appeal" matters too. *Graves*, 405 U.S. at 1203 (Powell, J., in chambers). Because the Court "lack[s] the discretionary power to refuse to decide" such cases, the "question [of] whether five Justices are *likely* to conclude that the case was erroneously decided below" takes on added importance in the stay analysis. *Id.* (emphasis added). And, as always, a party seeking a stay must demonstrate a likelihood that it "will be irreparably injured absent a stay." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks and citation omitted); see also *id.* (referring to irreparable injury to "the applicant").

The House has not satisfied any part of its "heavy burden of persuasion." *Graddick* v. *Newman*, 453 U.S. 928, 933 (1981) (Powell, J., in chambers). The House cannot show that it is likely to obtain reversal of the district court's judgment

because the House cannot even satisfy its threshold burden of showing that this Court has jurisdiction. See *infra* Part I. The House does not represent the Commonwealth, its voters, political candidates, or the people who administer Virginia elections, and the House cannot show that *it* will suffer any irreparable harm if a stay is denied. See *infra* Part II. And the balance of equities tips sharply against a stay, both because of the risk of irreparable harm to the plaintiffs if a stay is granted and because of the House's delay in seeking a stay. See *infra* Part III.

I. The House cannot show that the district court's presumptively correct judgment is likely to be reversed

"Federal courts are courts of limited jurisdiction." *Kokkonen* v. *Guardians Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* In particular, "it is the burden of the party who seeks the exercise of jurisdiction in [its] favor clearly to allege facts demonstrating that *[it] is a proper party* to invoke judicial resolution of the dispute." *United States* v. *Hays*, 515 U.S. 737, 743 (1995) (internal quotation marks and citation omitted) (emphasis added).

Our motion to dismiss has extensively canvassed both why there has been no standing problem until this point and why the House lacks "standing to appeal" the district court's judgment to this Court. *Hollingsworth* v. *Perry*, 570 U.S. 693, 700 (2013); see State Appellees' Mot. to Dismiss 1–18. This Court's November 13, 2018 order expressly declined to note probable jurisdiction in this case and specifically directed all parties—including the House—"to fully brief" the threshold question of

whether the House "ha[s] standing to bring this appeal." The House thus labors under two burdens: not only to show that a stay is warranted in some abstract sense but also to establish that the House is a party entitled to seek one.

The current application falls far short of meeting that burden. The House's 23-plus-page stay application devotes just *two paragraphs* to arguing that it has standing to appeal. Application 13–14. Even more importantly, those two paragraphs simply: (a) recycle arguments that our motion to dismiss has already refuted; and (b) cite (without any discussion) four decisions of this Court that we have already explained do not establish the House's standing to appeal. See State Appellees' Mot. to Dismiss 4–6 & n.4 (explaining why the House's ability to defend the current districts in the court below and during the previous, plaintiff-taken appeal to this Court do not bear on the standing question here); *id.* at 7–16 (extensively discussing all four decisions referenced on page 14 of the Application). Such cursory treatment is wholly insufficient to meet the House's burden as "the party who seeks the exercise of jurisdiction in [its] favor." *Hays*, 515 U.S. at 743 (citation omitted).

The House fares no better in its claim that it has "standing to seek relief preserving the status quo so that this Court can consider, *inter alia*, objections to [the House's] standing." Application 14. For one thing, the current status quo is that the district court's decision is "presumptive[ly] correct[.]" *Conforte*, 459 U.S. at 1311 n.1 (Rehnquist, J., in chambers). More importantly, this Court has emphatically rejected the concept of "hypothetical jurisdiction," *Steel Co.* v. *Citizens for a Better*

Env't, 523 U.S. 83, 94 (1998), which is precisely what the House is invoking by inviting this Court to *assume* that the House has standing for purposes of *granting* its request to stay the district court's judgment.

Nor does enforcing this Court's traditional rules prioritizing jurisdictional issues create any sort of anomaly here. Indeed, the House's continued failure to fully argue (much less to successfully demonstrate) that it has standing to appeal is, by itself, a sufficient basis for concluding that the House has failed to carry its heavy burden of showing that it is entitled to the "extraordinary relief" of a stay. *Teva Pharms. USA, Inc.* v. *Sandoz, Inc.*, 572 U.S. 1301, 1302 (2014) (Roberts, C.J., in chambers); accord *Sweezy* v. *New Hampshire*, 354 U.S. 234, 236 (1957) (dismissing appeal where "[t]he parties neither briefed nor argued the jurisdictional question," which meant that "[t]he appellant ha[d] thus failed to meet his burden of showing that jurisdiction was properly invoked"); see also J.S. 7 (devoting one sentence and two unexplained citations to standing).

II. The House has not shown that it will suffer irreparable injury absent a stay

The House's discussion of irreparable injury is conspicuously light on any claim of irreparable injury to the House itself.

Instead, the House contends that "Virginia and its citizens will suffer irreparable harm absent a stay." Application 18 (emphasis and capitalization removed). But a party seeking a stay must demonstrate a likelihood of irreparable injury *to that party*—a task the House never even attempts. See *Nken*, 556 U.S. at 433–34 (framing second "traditional stay factor[]" as whether "the applicant will be irreparably injured absent a stay") (internal quotation marks and citation omitted);

accord *Graddick*, 453 U.S. at 933 (Powell, J., in chambers) (stating that an applicant must establish "a threat of irreparable injury *to interests that he properly represents*") (emphasis added).

The House has never claimed the right—and has no ability—to speak on behalf of anyone other than itself. To the contrary, the motion to intervene cited the House's status as "the legislative body that actually drew the redistricting plan at issue" and asserted that the House and its speaker were seeking intervention "to protect *their* interest in the subject matter of this litigation." Intervention Motion at 2–3 (emphasis added). At no point did the House claim to represent the Commonwealth itself or assert that state law gave it any right to do so. See *id.* at 6 (final sentence) (asking "this honorable Court allow Applicants to intervene as defendants in order to protect *their* interest in the subject matter of this litigation") (emphasis added).

Just as important, Virginia law does not authorize the House to represent the interests of the Commonwealth in this Court. To be sure, like all intangible entities, "a State must be able to designate agents to represent it in federal court." *Hollingsworth*, 570 U.S. at 710. But Virginia law is crystal clear that it is the State's elected Attorney General who has the exclusive authority to represent the Commonwealth "in civil matters" like this one. Va. Code Ann. § 2.2-507(A). The House cannot establish irreparable injury simply by "piggyback[ing]" on the irreparable injury that Virginia itself would have been able to claim had the Attorney General determined that an appeal was warranted. *Diamond* v. *Charles*,

476 U.S. 54, 64 (1986).

The House's references to voters, candidates, and state election officials, see Application 19–24, likewise fail to satisfy the House's burden of establishing irreparable injury *to the House* absent a stay. For one thing, the House does not represent any of those people or entities. Instead, intervention was sought and granted only to the House and its Speaker in his official capacity, as shown (among other things) by the mid-litigation substitution of M. Kirkland Cox for William J. Howell when the speakership changed hands. See D. Ct. Dkt. No. 251 (citing Fed. R. Civ. Proc. 25(d), which provides for automatic substitution for "a public official who is a party in an official capacity"); J.S. iii (acknowledging that Speaker Cox is participating "in his official capacity as Speaker of the Virginia House").

In addition, the House has no role whatsoever in administering Virginia's elections. But see Application 14 (asserting, without explanation, that "Applicants" would be "forc[ed] . . . to prepare for next November's elections" under the district court's remedial order). In Virginia, as elsewhere, the legislative branch enacts laws while the executive branch enforces them. And, as already explained, the state election officials who *are* responsible for ensuring "an orderly elections process," Application 21, and preventing voter and candidate confusion have concluded that a stay is neither necessary nor in the public interest at this point.

III. The District Court correctly concluded that the balance of equities also weighs against a stay

Although the merits and irreparable-injury factors "are the most critical," *Nken*, 556 U.S. at 434, this Court has stated that, "in a close case it may be

appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); accord *Nken*, 556 U.S. at 435 (noting that "the traditional stay inquiry [also] calls for assessing the harm to the opposing party and weighing the public interest"). This analysis only confirms the House's failure to meet its "heavy burden of persuasion" in seeking a stay. *Graddick*, 453 U.S. at 933 (Powell, J., in chambers).

1. The stay application repeatedly mentions that the members of the three-judge district court divided 2-1 on the question of liability. But the House conspicuously fails to highlight the fact that those same three judges have—twice—*unanimously* denied the House's requests to stay the district court's ruling pending appeal. Application App. 1–5; see *Whalen* v. *Roe*, 423 U.S. 1313, 1317 (1975) (Marshall, J., in chambers) (noting that "Justices have . . . weighed heavily the fact that the lower court refused to stay its order pending appeal" (citing *Graves*, 405 U.S. at 1203 (Powell, J., in chambers)).

More than four months ago, the district court concluded that "[d]elaying construction of a remedial plan until after the conclusion of Supreme Court review likely would result in . . . the last election cycle before the 2020 census[] proceeding under the unconstitutional districts." Application App. 3. That "likely . . . irreparable injury" to the plaintiffs, the district court concluded, "significantly outweighs the inconvenience and any other detriments that the [House] may experience in re-drawing the districts." *Id.*; accord *id.* at 4 (Payne, J., concurring) ("I

fully agree with the irreparable injury analysis made by the majority, and, on balance, the injury to the plaintiffs if a stay is granted significantly outweighs the injury to the [House] if the stay is denied."); accord *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964) ("[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.").

As it did in its most recent filing to the district court, the House tries to relitigate the district court's balancing of the equities by arguing that it makes more sense to halt everything until this Court concludes its review and insisting that there will be plenty of time to draw new districts afterwards. See Application 19–24. But that sort of "refined factual evaluation" of what makes sense on the ground is precisely the sort of situation where this Court should be most deferential to a three-judge district court's "collective evaluation and balancing of the equities." *Aberdeen & Rockfish R.R. Co.*, 409 U.S. at 1218 (Burger, C.J., in chambers); accord *Williams*, 442 U.S. at 1312 (Stevens, J., in chambers) (emphasizing that "[w]here the lower court has already performed this task [of balancing the equities] in ruling on a stay application, its decision is entitled to weight and should not lightly be disturbed"). Such deference is all the more appropriate where—as here—the district court's case-specific judgment about whether a stay makes sense at this point is shared by the state election officials actually charged with ensuring "an orderly elections process." Application 21; see Second Stay Opposition 5.

2. The application also should be denied because of the House's tardiness in seeking a stay from this Court. The district court denied the House's first stay motion on August 30, 2018, nearly four months ago. See Application App. 3. The House did not seek a stay from this Court at that point. The House did not seek a stay on September 4, when it filed its jurisdictional statement with this Court. The House did not seek a stay on October 19, when the district court entered an order establishing the remedial schedule about which the House now complains. And the House did not seek a stay on November 13, when this Court set the case for full briefing and argument.

Instead, the House waited more than two additional weeks (until November 29) before making a second stay request of the district court. And, after that request was denied by the district court on December 7, the House waited another six days before seeking "emergency" relief from this Court. "While certainly not dispositive, the [House's] failure to act with greater dispatch tends to blunt [its] claim of urgency and counsels against the grant of a stay." *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers).

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.



TONY J. HEYTENS
Solicitor General
Counsel of Record

MARK R. HERRING
Attorney General

STEPHEN A. COBB
Deputy Attorney General

MATTHEW R. MCGUIRE
Principal Deputy
Solicitor General

MICHELLE S. KALLEN
Deputy Solicitor General

BRITTANY M. JONES
Attorney

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240 — Telephone
(804) 371-0200 — Facsimile
SolicitorGeneral@oag.state.va.us

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